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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO PETER ALFARO,

Defendant and Appellant.

C038523

(Super. Ct. No. SC060884A)

Defendant Alfonso Peter Alfaro appeals from his convictions for attempted murder and assault with a firearm arising from the shooting of a convenience store cashier. The jury also made special findings that the attempted murder was willful, deliberate, and premeditated and that defendant personally used a firearm in the commission of the offenses.

On appeal, defendant contends that insufficient evidence supported the verdict of attempted willful, deliberate, and

premeditated murder, that the trial court erred in instructing the jury concerning aiding and abetting, concerning the testimony of unjoined perpetrators (CALJIC No. 2.11.5), and concerning eyewitness testimony (CALJIC No. 2.92), and that it erred in admitting photographs of the victim in the hospital. Finally, defendant contends that his trial counsel was ineffective.

We find no error warranting reversal and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Shooting

Sometime after midnight, defendant -- together with his cousin Pedro Garcia (Pedro) and his nephew Joseph Rene Rodriguez (Rene)¹ -- left a family gathering in order to do a "beer run," i.e., to steal beer by grabbing it and running from the store. All three men had been drinking.

When they left for the "beer run," Pedro was driving. Defendant was seated in the front passenger seat, wearing a black-and-white "Sox" cap and a black jacket that had white stripes and a large "Adidas" logo on the back. Rene wore a borrowed black-and-white Eagles jacket with a hood.

¹ Because several witnesses have identical surnames, we shall refer to them on occasion by their first names for clarity and not out of any disrespect.

After the three had been driving for only a short time, defendant suggested that they "go pick up a gun." He repeated this suggestion a couple of times to Rene, whom defendant knew owned a gun and who initially declined. When Pedro asked why defendant wanted the gun, defendant answered, "For protection." Pedro drove to Rene's house, where Rene retrieved his .38 Special. As they drove away, Rene reached over the front seat and handed defendant the gun, which defendant put into his jacket.

Eventually, the three stopped at a Quick Stop market. Pedro parked in the back alley, where his car would be less visible.

Defendant and Rene went into the market. Rene went to the rear of the market, where the beer was kept, while defendant paced in front of the counter and spoke to the cashier, Sukhdev Singh, who was alone in the store. Singh repeated several times that identification was required if they wanted to buy beer. Defendant responded that they had no identification with them and told Rene to put the beer back. Defendant and Rene then left the store. But before they left, Singh picked up the phone.

Almost immediately after defendant left the store, five gunshots were fired through the store's window into the market. A bullet struck Singh and pierced his heart, but he survived.

Defendant, Rene, and Pedro then drove to a service station convenience market, where Pedro stole beer. All three then

returned to the family gathering. Rene sold the gun soon thereafter because he "didn't want somebody finding out" that it was his gun that was used in the shooting.

II. *The Investigation*

The shooting was recorded by a surveillance video camera in the market.

The police interviewed both Rene and Pedro, and then arrested defendant for Singh's shooting.

Defendant consented to be interviewed by Detective Gary Catherwood and denied any knowledge of the shooting. He also denied any presence at the family gathering on the night of the shooting. When shown some still photographs prepared from the videotape of the shooting, defendant first said "it could be me" and then said "that ain't me." But when Detective Catherwood asked defendant what jackets he owned, defendant admitted owning an "Adidas jacket like the one in the photo."² The detective then observed that he had not told defendant that an Adidas jacket was depicted in the photo.

Pedro and Rene were also charged with the attempted murder of Singh, but each pleaded guilty to being an accessory after the fact in order to receive a reduced sentence.

² Defendant's wife testified for the defense that defendant does not own an Adidas jacket.

III. The Trial

A. The Prosecution Case

On the first day of trial, the surveillance videotape of the shooting was played for the jury.

Although Singh had not been able to identify the shooter from a photo lineup prepared by police and did not see who shot him, once he viewed the videotape, he testified that the shooter was the man who had stood at the counter wearing the black jacket with white stripes, whom he identified as defendant.³

The second day of trial, defendant (who was not in custody) failed to appear. The court determined that defendant had voluntarily absented himself from the trial and ordered the proceedings to continue in his absence. (Pen. Code, § 1043, subd. (b) (2).)⁴

Thereafter, Pedro and Rene both testified in support of the prosecution theory that defendant had shot Singh.

Rene testified that he had heard the gunshots before he reached Pedro's car, and accordingly threw himself into the back seat. Defendant quickly followed, and when they were both in the car, Rene asked him, "What the fuck did you do?" Defendant

³ We have viewed the videotape of the shooting, in which the defendant is plainly visible at the counter.

⁴ All further undesignated statutory references are to the Penal Code.

said something like "I shot the clerk through the window" and told Pedro to "just go."

Rene also testified that defendant's mother had urged him (Rene) to flee to Mexico to avoid testifying and that one of defendant's brothers had made a threatening gesture toward him.

In turn, Pedro testified that after Rene and the defendant had returned to the car following the shooting, he heard Rene ask defendant, "Why did you shoot the clerk?" Defendant responded that it was "[b]ecause he was looking at him weird."

Defendant made a similar admission to his cousin, Henry Garcia, which came in through the testimony of Detective Catherwood: Catherwood testified that he interviewed Henry, who reported that when defendant and the others had returned from their beer run, defendant told Henry "that he, Alfonso, shot through the window" when "[t]he clerk was on the phone to the police department." (In fact, the videotape of the shooting shows that Singh had picked up the telephone even before defendant and Rene left the store.) But when Henry testified at trial, he recanted his statement to police and denied having had such a conversation with defendant.

B. *The Defense*

The main defense theory was that Rene, not defendant, shot Singh.

Defendant's brother (and Rene's uncle), Julio Garcia, testified that Rene admitted shooting the clerk after a

confrontation with the store clerk, who also had a gun. Julio testified that his conversation with Rene occurred the day after Rene was released from jail, and that Rene's brother Edward Rodriguez was also present.

Julio also testified that he discussed the shooting with Pedro, when he saw Pedro with some friends at the mall. Julio testified that Pedro said: "Well, I didn't even see nothing. I was around the corner sitting in the car. And they came around the corner running towards the car, and Rene had the gun in his hand and they jumped in the car and they left."

Defendant's nephew, David Martinez (a cousin to Rene and Pedro), testified that while he and Rene were driving in a car, David asked, "Rene, hey, who really shot that guy?" Rene responded, "I did. But I was scared."

A secondary theory of the defense was that defendant was too intoxicated to form the intent to kill Singh. Defendant's wife testified that before defendant had left on the beer run with Rene and Pedro, he was unsteady on his feet and his speech was slurred.

The defense also attempted during its cross-examination of Rene, Pedro, and Rene's brother Edward Rodriguez to establish that Rene had a reputation for violence and for being a snitch. Defendant's wife testified that Rene threatened her after the arrests, saying, "Your husband's a dead man."

C. *The Prosecution's Rebuttal*

In rebuttal by the prosecution, Rene's brother Edward testified about the conversation that he had overheard between defendant's brother Julio and Rene, in which Rene had supposedly admitted shooting Singh, and denied that Rene admitted shooting Singh. Rather, Edward testified that Rene told Julio that defendant had done it. In his view, Julio believed that "Rene snitched out Alfonso" and was angry.

In rebuttal of David Martinez's testimony that Rene admitted the shooting, Edward testified that David Martinez "tends to lie a lot."

And Rene testified in rebuttal that he could not have threatened defendant's wife because he was working with his father that day.

D. *The Verdict*

The jury found defendant guilty of willful, deliberate, and premeditated attempted murder of Singh (§§ 664/187/189; count 1) and of assault with a firearm (§ 245, subd. (a)(2); count 2). As to both crimes, the jury also found that defendant personally used a firearm in the commission of the crime (§ 12022.5, subd. (a)) and that he had intentionally inflicted great bodily injury on Singh (§ 12022.7, subd. (a)). Finally, the jury found defendant guilty of being a felon in possession of a firearm (§ 12021, subd. (a); count 3).

DISCUSSION

I. Defendant's Attempted First Degree Murder Conviction Is Supported by Substantial Evidence

In finding defendant guilty of attempted murder, the jury made the special finding that defendant acted willfully and with deliberation and premeditation.

Defendant contends that "[t]he evidence [was] insufficient to support a verdict of attempted willful, deliberate and premeditated murder."

First degree murder is defined by section 189, which provides in pertinent part: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by *any other kind of willful, deliberate, and premeditated killing*, . . . is murder of the first degree. All other kinds of murders are of the second degree. [¶] . . . [¶] To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (Italics added.)

For purposes of determining whether there is sufficient evidence of premeditation and deliberation, we do not distinguish between attempted murder and completed first degree murder. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462-1463, fn. 8.) Moreover, "[s]ettled principles of appellate

review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; see also *People v. Herrera, supra*, 70 Cal.App.4th at p. 1463.) "'In reviewing the sufficiency of the evidence, we must draw all inferences in support of the verdict that can reasonably be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'" [Citation.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 813.) Finally, we "may not redetermine the credibility of witnesses, nor reweigh any of the evidence," but "must . . . resolve all conflicts, in favor of the judgment." (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

In this case, defendant argues that "[t]his was a sudden, surprise shooting, but not a premeditated attempt to kill."

That is certainly one interpretation of the evidence, but it is not the only one. To the contrary, defendant's repeated requests for a gun in preparation for the "beer run," the fact that the defendant believed (according to Henry Garcia's interview) that Singh was picking up the phone to call the police before the defendant shot him, and the fact that the defendant shot at him five times at close range, one shot nearly

hitting a bull's-eye, support the jury's finding that defendant had planned with deliberation and premeditation to shoot anyone who impeded his "beer run."

In arguing that the evidence was insufficient, defendant relies upon the oft-cited test found in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), which sets forth three categories of evidence for a reviewing court to consider in evaluating proof of premeditation and deliberation: facts related to (1) the defendant's planning activity prior to the killing; (2) his motive to kill, derived from his prior relationship or conduct with the victim; and (3) the manner of killing, indicating some preconceived design to kill in a certain way.

In defendant's view, (1) the "facts plainly belie any preconceived plan to kill" because there was no evidence of planning in the selection of victim or location, no attempt to preclude the possibility of witnesses, and no time for any of the foregoing to occur; (2) the evidence "shows no clear motive for a killing," inasmuch as defendant and his relatives did not know the victim, and the shooting was not done to facilitate a theft because none was committed; and (3) the "random, violent, indiscriminate attack" on Singh does not show an "'exacting' manner of killing, from which one can reasonably infer that [a] death was intended," as required by *Anderson*.

Defendant's analysis of the *Anderson* factors is flawed.

First, "[e]vidence of all three elements [enumerated in *Anderson*] is not essential . . . to sustain a conviction. A reviewing court will sustain a conviction where there exists evidence of all three elements, where there is 'extremely strong' evidence of prior planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill. [Citation.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 813-814.)

Second, "[t]he *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] . . . The *Anderson* guidelines are descriptive, not normative. [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Perez, supra*, 2 Cal.4th at p. 1125.)

Third, the California Supreme Court has applied the *Anderson* factors to facts very similar to those before us and has found sufficient evidence to justify the jury's finding of premeditation and deliberation. (*People v. Miranda* (1987) 44 Cal.3d 57, 86 (*Miranda*), disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) In *Miranda*, the defendant shot a convenience store clerk who had

refused several requests to sell him beer because it was after 2:00 a.m. (*Miranda*, at pp. 71, 74.) The defendant testified that after the clerk rudely rebuffed his attempts, he pulled out a gun and demanded money. (*Id.* at pp. 71-72, 74.) A second clerk responded "okay," but the defendant shot him immediately anyway. (*Id.* at pp. 71-72.) The second clerk died as a result of the shooting. (*Id.* at p. 72.) The defendant then shot the first clerk and fled from the store *without* taking any cash. (*Id.* at pp. 72, 74.)

The Supreme Court in *Miranda* applied the tripartite *Anderson* test and found that there was sufficient evidence of premeditation and deliberation to support a verdict of first degree murder. It reasoned as follows: "The record here shows evidence of premeditation pertaining to each of the three categories. As to the first category, the fact that defendant brought his loaded gun into the store and shortly thereafter used it to [shoot] an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance. Moreover, defendant's warning that [the first and second clerks] should give him the money or he would shoot implies that defendant contemplated the killing. It has been recognized that premeditation can occur in a very brief period of time. [Citation.] "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, . . ."' [Citation.]

"As to motive, the evidence showed that immediately prior to the killing, [the first and second clerks] refused to sell beer to defendant. Defendant testified he became angry because he believed the men were being rude to him. Defendant requested to buy beer several more times but each time was refused. The conversation between defendant and his victims suggests that defendant acted with conscious motive and had time to reflect upon his plan to shoot the victims. '[T]he law does not require that a first degree murderer have a "rational" motive for killing. Anger at the way the victim talked to him . . . may be sufficient.' [Citations.]

"The manner of killing also suggests the shooting was conceived in advance. Defendant shot [the first and second clerks], who were unarmed and standing behind the counter a few feet away. The lack of provocation by the victim leads to an inference that an attack was the result of a deliberate plan rather than a 'rash explosion of violence.' [Citation.]"
(*Miranda, supra*, 44 Cal.3d at p. 87.)

In light of the reasoning and result in *Miranda*, we likewise conclude that there was evidence in this case of a motive to kill, coupled with evidence of planning activity, sufficient to permit a reasonable jury to find that defendant's actions were premeditated and deliberate. (Cf. *People v. Edwards, supra*, 54 Cal.3d at p. 814.) As in *Miranda*, there was evidence here that defendant was annoyed or angered by the victim: Pedro overheard defendant say he shot Singh "[b]ecause

he was looking at him weird," and there was evidence defendant told his cousin Henry that Singh was shot while he "was on the phone to the police department." From this, the jury could reasonably have inferred that defendant feared Singh was "looking at him" to make a mental note of his appearance in order to report him to the police. While defendant's failure to take anything might have made an arrest and prosecution difficult, the law does not require that a murderer have a flawless motive for an attempted killing, as noted in *Miranda, supra*, 44 Cal.3d at page 87. Thus, there was evidence from which to infer a motive to shoot Singh.

In addition, there was also evidence of planning by reason of "the fact that defendant brought [a] loaded gun into the store and shortly thereafter used it to [shoot] an unarmed victim[, which] reasonably suggests that defendant considered the possibility of murder in advance." (*Miranda, supra*, 44 Cal.3d at p. 87.) That defendant asked for a gun several times "for protection" before the three attempted their "beer run" also suggests that defendant was prepared to shoot anyone who impeded their beer run or their escape. The videotape of the shooting shows that defendant kept his right hand in his pocket while he paced in front of counter and spoke with Singh. The jury could reasonably have inferred that defendant had the gun in his hand and was prepared to shoot during his entire exchange with the victim. This, too, reflects planning. The jury might also have inferred that by waiting to shoot Singh

until after he left the store, defendant had additional moments to reflect on whether shooting Singh would prevent him from identifying defendant to the police.

Finally -- and like the defendant in *Miranda* -- shooting an unarmed cashier who has offered neither physical provocation nor threat "leads to an inference that an attack was the result of a deliberate plan rather than a 'rash explosion of violence.'" (*Miranda, supra*, 44 Cal.3d at p. 87.)

Defendant argues that "[b]ringing a gun to the convenience store is not planning in the *Anderson* sense since no one had formed any intent to kill Mr. Singh at that time." He contends an advance intent to kill "would have been impossible" because "[t]hey did not know Mr. Singh." But the evidence certainly supported a finding that defendant planned to kill anyone at the store who impeded his efforts or risked his arrest. Defendant did not need to know the identity of the cashier to know that there would be a cashier. And when Singh sought to inform the police about defendant, defendant simply executed his plan.

Defendant also argues that "there is no evidence [defendant] was planning to kill as opposed to planning to just generally shoot out the window and scare people and lash back at the store and clerk for not selling him beer. A single fortuitously placed shot, emanating from a gun held up outside a window and fired five times wildly into a store does not show a plan to specifically kill." But there was no evidence of any provocation that would have elicited a shooting in anger. The

jury could reasonably have concluded that the only act that elicited the shooting was Singh's picking up the phone to call the police -- an act that would provoke a plan to stop the call, that is, to kill the caller. Further, the well targeted shot -- it entered the pericardium (the sac that surrounds the heart) -- evidenced a design, rather than a fortuity.

We therefore conclude that viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a reasonable jury to find that defendant acted with the premeditation and deliberation necessary to sustain a finding of attempted first degree murder.

**II. *The Trial Court Did Not Abuse Its Discretion in
Admitting a Photograph of the Victim's Injury***

During its consideration of the motions in limine, the trial court announced its willingness to admit only two photographs of the victim, Singh, both of which were taken in the hospital. Defense counsel objected at trial to the admission of one of those two photographs -- a photograph taken in the emergency room of the hospital after the shooting -- on the grounds the photograph was irrelevant, gruesome, and prejudicial. The prosecutor argued in response that the photograph, exhibit 14A, was relevant to proving that the victim suffered great bodily injury and that the shooter acted with intent to kill. The court agreed, and explained, "That's the reason we let it in."

On appeal, defendant renews his argument that exhibit 14A was wholly irrelevant, because it has "absolutely no tendency in reason to show the state of mind of the shooter at the time the shots were fired. Intent to kill was conceded." He further claims that the photograph was inflammatory and that its admission violated his due process rights under the Fourteenth Amendment to the federal Constitution.

Defendant also objects for the first time on appeal to the admission of exhibit 3, a photograph of Singh which shows a surgical scar on his chest. At trial, however, defendant raised no objection to exhibit 3. In fact, he stipulated to its admission. Defendant's failure to interpose an objection to the admissibility of exhibit 3 at trial constitutes a waiver of the issue on appeal. (Evid. Code, § 353, subd. (a); *People v. Hart* (1999) 20 Cal.4th 546, 615.)⁵

"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is

⁵ In his reply, defendant claims that if his counsel waived his objection to exhibit 3, it is an example of ineffective assistance of counsel. However, "[o]bvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.)

outweighed by their prejudicial effect. [Citations.]”
[Citation.]” (*People v. Hart, supra*, 20 Cal.4th at pp. 615-616,
citing *People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.)

We agree with the trial court that the photograph (exhibit 14A) was relevant. A photograph that shows that the victim suffered a bullet wound to the heart is evidence tending to prove both that the victim suffered great bodily injury (as charged in the operative information) and that the shooting represented a deliberate effort to kill, rather than an “unlucky” bullet randomly fired, as defendant argues on appeal. Photographic evidence of the location and seriousness of the wound suffered by a victim can provide evidence of both the attempted killer’s intent and even his deliberation in the execution of that intent. (Cf. *People v. Box* (2000) 23 Cal.4th 1153, 1199; *People v. Hart, supra*, 20 Cal.4th at p. 616.)

Moreover, having viewed exhibit 14A, we also conclude that this photograph cannot be characterized as gruesome or inflammatory. It shows a side view of Singh laying on his back in the hospital, wearing a blood pressure cuff and a breathing mask. A round red wound, about the size of a quarter, appears near the center of his chest. True, there are rivulets of blood on his side and shoulder, and blood appears to have been wiped incompletely from the side of his neck. But this is a less dramatic image than shown in many films and is not particularly inflammatory. The trial court did not abuse its discretion in concluding that the probative value of exhibit 14A outweighed

its prejudicial effect. (E.g., *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 133-135, and cases cited therein.)

Insofar as defendant asserts that the trial court was required to exclude the photograph because it was "cumulative" of the testimonial evidence presented, his argument also lacks merit. As the California Supreme Court has explained: "'We often have rejected the contention that photographs of a murder victim must be excluded as cumulative simply because testimony also has been introduced to prove the facts that the photographs are intended to establish.'" (*People v. Box*, *supra*, 23 Cal.4th at p. 1199; see also *People v. Scheid* (1997) 16 Cal.4th 1, 19, and cases cited therein.) "[P]hotos are not cumulative simply because they illustrate evidence presented by other means." (*People v. Anderson* (2001) 25 Cal.4th 543, 592; *People v. Raley* (1992) 2 Cal.4th 870, 897.)

Defendant's contention that the trial court erred in admitting the photograph because the defense "offer[ed] to stipulate to the existence of great bodily injury and intent to kill" is also without merit. True, under some circumstances, a defendant's offer to stipulate to an element of a charged offense can require the prosecution to accept the offer and refrain from introducing evidence on that element, on the theory that "'[i]f a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively.'" (*People v. Bonin* (1989) 47 Cal.3d 808, 848-849; *People v. Hall* (1980) 28 Cal.3d

143, 152, disapproved on another point in *People v. Newman* (1999) 21 Cal.4th 413, 420.) But that did not happen here: Although he offered to stipulate that the shooter had an intent to kill, defendant neither offered to stipulate that the shooter acted with deliberation, nor that the victim suffered great bodily injury. Indeed, he later expressly refused to stipulate over the infliction of great bodily injury. When a photograph remains relevant to issues on which the defense has not offered to stipulate, its admission is not error. (*People v. Anderson, supra*, 25 Cal.4th at p. 592.)

Moreover, even had the defense offered to stipulate that the shooter acted with deliberation and that the victim suffered great bodily injury, it is not clear that the trial court would have been obliged to exclude the photograph depicting Singh's injury.⁶ "[T]he prosecution [is] not obligated to 'accept

⁶ The authorities cited by defendant in support of his argument that "[i]f the defendant offers to stipulate to a relevant fact, . . . then the offer to stipulate precludes the admission of any prejudicial evidence tending to prove the fact" are inapposite: All three cases involved an offer to stipulate to evidence concerning (or arising from) crimes *other* than those charged. (See *People v. Guzman* (1975) 47 Cal.App.3d 380, 389-390, disapproved on another ground in *People v. McDonald* (1984) 37 Cal.3d 351, 371, fn. 10 ["Evidence of prior crimes should be admitted only when there is a real issue to which such evidence is directed. [Citations.] Every effort should be made to meet the issue in another way or eliminate it entirely. Where it is possible to meet the issue by a stipulation it is error to refuse to do so and thus unnecessarily bring before the jury the evidence of other crimes"]; *People v. Gonzales* (1968) 262 Cal.App.2d 286, 290-291 ["The trial court, in other words,

(CONTINUED.)

antiseptic stipulations in lieu of photographic evidence.’
[Citations.]” (*People v. Box*, *supra*, 23 Cal.4th at p. 1199; see
also *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1973-1974
[offering to stipulate to the cause of death does not render
irrelevant all victim photographs because, among other reasons,
“a defendant has no right to transform the facts of a gruesome
real-life murder into an anesthetized exercise where only the
defendant, not the victim, appears human”].) Rather, the jury
is entitled “‘to see how the physical details of the scene and
the bod[ies] supported the prosecution theory of [first degree
murder].’ [Citation.]” (*People v. Pride* (1992) 3 Cal.4th 195,
243, bracketed text in original, italics added; see also *People*
v. Thompson, *supra*, at pp. 1973-1974.)

had the discretion to allow a defendant to admit his knowledge
of the narcotic nature of the narcotic he allegedly possessed,
and, thereby, prevent the introduction of prejudicial evidence
of other offenses to prove admitted knowledge”].)

Defendant also relies upon *People v. Hall*, *supra*, 28 Cal.3d
143, which held at pages 153 through 157 that when a prior
conviction is pertinent only to ex-felon status as an element of
a currently charged offense, and the defendant stipulates that
he or she is an ex-felon, the jury may not learn either the fact
or the nature of the prior conviction. But the per se rule of
Hall has been abrogated by the subsequent amendment to the
California Constitution, article I, section 28, subdivision (f),
which provides in pertinent part: “When a prior felony
conviction is an element of any felony offense, it shall be
proven to the trier of fact in open court.” (*People v.*
Cunningham (2001) 25 Cal.4th 926, 984.) And where the defendant
agrees to stipulate to his ex-felon status, only evidence of the
nature of his prior conviction may be withheld from the jury.
(*People v. Valentine* (1986) 42 Cal.3d 170, 173.)

Here, the jury was entitled to see how evidence of Singh's wound to the heart tended to prove deliberation and the infliction of great bodily injury.

The trial court's decision to admit exhibit 14A was not error.

III. *There Was No Reversible Error Attributable to Instructing the Jury on a Theory of Aiding and Abetting*

The trial court instructed the jury on two alternate theories of liability for attempted first degree murder:

(1) that defendant shot Singh, or (2) that defendant aided and abetted another in committing the crime of burglary, a natural and probable consequence of which was the shooting of Singh.

However, during his brief closing argument, the prosecutor made no mention of the aiding and abetting theory. He argued exclusively that "it's clear the shooter equals the defendant It's not Rene Rodriguez."

On appeal, defendant contends that his convictions must be reversed because (1) "aiding and abetting was improperly submitted to the jury as a legal theory for assessing criminal liability"; (2) "the natural and probable consequences theory of extended liability [was] inapplicable on the facts of this case"; and (3) one of the instructions given on aiding and abetting, CALJIC No. 8.67, was "misleading" and erroneously suggested to the jury that "one may be vicariously liable for the intent of another."

A. Applicability of an Aiding and Abetting Theory

It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see also *People v. Singleton* (1987) 196 Cal.App.3d 488, 492 [trial courts are duty-bound to avoid instructions which are not justified by the facts of the case, since they have a natural tendency to overburden and confuse the jury].)

Here, there was arguably insufficient evidence to support a conviction of attempted murder based on defendant's aiding and abetting the shooter or of the shooting being the natural and probable consequence of a burglary.

"Ordinarily, if an alternative theory of criminal liability is found unsupported by the evidence, the judgment of conviction may rest on any legally sufficient theory unaffected by the error, unless the record affirmatively demonstrates that the jury relied on the unsupported ground." (*People v. Sanchez* (2001) 26 Cal.4th 834, 851; *People v. Guiton, supra*, 4 Cal.4th at pp. 1129-1130.)

Even assuming that there was insufficient evidence upon which to base an aiding and abetting theory, the record here affirmatively demonstrates that the jury did *not* rest defendant's attempted first degree murder verdict on a theory of vicarious liability based on aiding and abetting. Rather, it relied upon the prosecution's chief theory, i.e., that defendant was directly liable for attempted murder and assault because he,

not Rene, shot Singh: The jury found true allegations that defendant *personally* used a firearm in the course of his attempted commission of the willful, deliberate, and premeditated murder of Singh, and that defendant intentionally inflicted great bodily injury on Singh in the course of attempting to murder him.

Having found that defendant *personally* used the firearm in the attempted murder of Singh, the jury could not have relied upon a theory that defendant was merely vicariously liable for the actions of a co-participant. Nor could defendant intend to inflict great bodily injury on Singh if he only intended to aid a burglary, which merely had the natural and probable consequence of an attempted murder. It is thus of no consequence that a theory that the jury plainly rejected was not supported by the facts.

Moreover, the jury received the standard instruction to disregard any instruction which it found to be unsupported by the evidence (CALJIC No. 17.31), and we presume the jury heeded this instruction. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

Defendant nonetheless suggests that the jury finding of personal use of a firearm "could include other actions besides the actual shooting." But in this case, the only use of a firearm by the defendant was the shooting itself; there was no evidence that the gun was used to threaten Singh. Accordingly, it is clear that the jury's finding demonstrated that it found

that defendant personally used the gun to shoot Singh and not that he aided and abetted another person who shot Singh.

B. CALJIC No. 8.67

Defendant also takes issue with that portion of CALJIC No. 8.67, which states in pertinent part: "To constitute willful, deliberate, and premeditated attempted murder, the would-be slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being."

Defendant contends this instruction is "misleading" in light of the California Supreme Court's holding in *People v. McCoy* (2001) 25 Cal.4th 1111, because "[a]n aider and abettor may be vicariously liable for acts of another but is not vicariously liable for the intent of another" and that the instruction erroneously suggested to the jury that "one may be vicariously liable for the intent of another."

Even assuming for argument's sake that defendant is correct that the instruction could be improperly construed to suggest that an aider and abettor could be vicariously liable for the perpetrator's intent, there is no basis for reversal.

"An instructional error presenting the jury with a legally invalid theory of guilt does not require reversal . . . if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory." (*People v. Pulido*

(1997) 15 Cal.4th 713, 727, citing *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) Thus, we affirm the judgment even when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect (*Guiton*, *supra*, at p. 1122), if there is "a basis in the record to find that the verdict was actually based on a valid ground. [Fn. omitted.]" (*Id.* at p. 1129; see also *People v. Morales* (2001) 25 Cal.4th 34, 42-43].)

Here, as we explained, the jury's special findings that defendant personally used a gun in the crimes and intentionally inflicted great bodily injury on Singh plainly shows that the jury rested its verdict on the legally and factually supported theory that defendant intentionally shot Singh in an effort to kill him. There is no basis for reversal.

IV. The Trial Court Did Not Err in Failing to Instruct the Jury on Eyewitness Testimony with CALJIC No. 2.92

Defendant contends on appeal that the trial court erred in failing to instruct the jury with CALJIC No. 2.92 on the factors to consider in evaluating the eyewitness testimony that identified defendant as the perpetrator of the crimes charged.⁷

⁷ CALJIC No. 2.92 (6th ed. 1996) provides: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the

(CONTINUED.)

However, the record reflects that defense counsel did not request the instruction. Defendant's failure to request the instruction waives his right to have it given. "CALJIC No. 2.92 or a comparable instruction should be given *when requested* in a case in which identification is a crucial issue *and* there is *no* substantial corroborative evidence." (*People v. Wright* (1988) 45 Cal.3d 1126, 1144, italics added.) "No case has imposed a sua sponte duty to instruct the jury on CALJIC No. 2.92." (*People v. Sanchez* (1990) 221 Cal.App.3d 74, 76.) "We perceive

accuracy of the witness's identification of the defendant, including, but not limited to, any of the following:

"[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

"[The stress, if any, to which the witness was subjected at the time of the observation;]

"[The witness's ability, following the observation, to provide a description of the perpetrator of the act;]

"[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

"[The cross-racial [or ethnic] nature of the identification;]

"[The witness's capacity to make an identification;]

"[Evidence relating to the witness's ability to identify other alleged perpetrators of the criminal act;]

"[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

"[The period of time between the alleged criminal act and the witness's identification;]

"[Whether the witness had prior contacts with the alleged perpetrator;]

"[The extent to which the witness is either certain or uncertain of the identification;]

"[Whether the witness's identification is in fact the product of [his] [her] own recollection;]

"[_____];] and

"Any other evidence relating to the witness's ability to make an identification."

a good reason why no sua sponte duty to give CALJIC No. 2.92 has evolved. The instruction cuts two ways. While it may be of benefit to a defendant in a particular case, so may it enhance the prosecution's argument in another. . . . We can readily see why a particular defendant may not want the trial judge to call to the jury's attention the very factors a prosecutor thinks are the strong points of the state's case. . . ." (*Id.* at p. 77.)

In light of the foregoing, defendant also asserts on appeal that his counsel's failure to request the instruction constituted ineffective assistance of counsel. But where, as here, the jury has been admonished with other instructions relating to the assessment of witness credibility and the application of the correct burden of proof -- with CALJIC No. 2.20 (assessing witness credibility), CALJIC No. 2.21.1 (considering discrepancies in testimony), CALJIC No. 2.22 (weighing of conflicting testimony), CALJIC No. 2.27 (considering the sufficiency of testimony from one witness), and CALJIC No. 2.90 (applying the standard of reasonable doubt) -- those instructions are deemed "sufficient to inform the jury that the prosecution had the burden of establishing identity, and that defendant should be acquitted in the event the jury harbored a reasonable doubt on the issue of identity." (*People v. Alcala* (1992) 4 Cal.4th 742, 803.) Thus, the failure to instruct with CALJIC No. 2.92 was not prejudicial, even assuming that it was ineffective assistance of counsel not to request the instruction.

**V. Any Error in Instructing the Jury on Unjoined Perpetrators
with CALJIC No. 2.11.5 Was Harmless**

The jury was instructed concerning unjoined perpetrators pursuant to CALJIC No. 2.11.5 as follows: "As I told you earlier, there has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There are many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial."

But the trial court immediately followed this instruction with the following oral modification: "Now, this instruction should be modified to consider the evidence that pertained to the two witnesses who testified in this case, and their deal with the prosecution. [¶] With that modification, that instruction stands."

However, the written instruction with which the jury was provided did not contain the modification.

Defendant contends that "[g]iving instruction No. 2.11.5 under these circumstances was grievous error" because "the jury *should* be considering why [Rene] Rodriguez and [Pedro] Garcia were not also on trial. They made deals and pretty much got off the hook. [Fn. omitted.] That is very important bias material for the jury to consider. Their credibility was very much at

stake.” Ultimately, defendant argues that instructing the jury with CALJIC No. 2.11.5 “effectively [told] the jury to disregard [defendant]’s defense” that Rene, not he, was the actual shooter.

The purpose of CALJIC No. 2.11.5 “is to discourage the jury from irrelevant speculation about the prosecution’s reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators.” (*People v. Price* (1991) 1 Cal.4th 324, 446, subsequently limited by statute, see *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161.) Literally read, however, the instruction does not, as defendant suggests, direct the jury to disregard reasons why Rene and Pedro might be biased in their testimony against defendant. It merely admonishes the jury not to consider why others have not been *prosecuted* in this trial.

Nonetheless, the California Supreme Court has held that it is error to instruct the jury with CALJIC No. 2.11.5 when there is evidence that a witness has admitted committing the crime(s) with which the defendant has been charged, but testifies for the prosecution and against the defendant under a grant of immunity. (*People v. Carrera* (1989) 49 Cal.3d 291, 312-313.) Under such circumstances, the high court has reasoned that a jury might understand the instruction to preclude it from considering whether the witness had a strong incentive to testify favorably to the prosecution, or whether the witness, not the defendant,

committed the crimes. (*Id.* at p. 312.) Indeed, the Use Note for CALJIC No. 2.11.5 commands: "Do not use this instruction if the other person is a witness for either the prosecution or the defense." (Use Note to CALJIC No. 2.11.5 (6th ed. 1996) p. 52.)

Erroneously instructing the jury with CALJIC No. 2.11.5, however, does not warrant reversal when the jury is otherwise instructed on the standards for assessing accomplice testimony and witness credibility. "When the instruction is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, a reasonable juror will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses." (*People v. Price, supra*, 1 Cal.4th at p. 446; *People v. Hardy* (1992) 2 Cal.4th 86, 190.) Indeed, the high court in *People v. Carrera, supra*, 49 Cal.3d at page 313, found the error harmless and the potential for jury misunderstanding minimal when the jury was instructed with CALJIC No. 2.20 on evaluating the believability of a witness and with CALJIC No. 1.01 on the obligation to consider the instructions as a whole.

In this case, the jury was likewise instructed to consider the instructions as a whole (CALJIC No. 1.01) and was admonished under CALJIC No. 2.20 to consider "[t]he existence or

nonexistence of bias, interest, or other motive" when evaluating the credibility of a witness (CALJIC No. 2.20), under CALJIC No. 3.18 to view accomplice testimony with distrust, and finally, under CALJIC No. 3.11 that accomplice testimony must be corroborated. When these instructions are given, "[t]he potential for . . . a misunderstanding of the instruction appears minimal . . . and the error in giving the instruction accordingly harmless." (*People v. Carrera, supra*, 49 Cal.3d at p. 313; *People v. Hardy, supra*, 2 Cal.4th at p. 190.)

That is particularly the case here where the court also gave an oral modification to the challenged instruction, admonishing that "this instruction should be modified to consider the evidence that pertained to the two witnesses who testified in this case, and their deal with the prosecution." Thus, the jury was further advised to consider the witnesses' deal with the prosecution here.

In short, although it may have been error to instruct the jury with CALJIC No. 2.11.5, the error was harmless.

VI. Defendant Was Not Denied Effective Assistance of Counsel

Defendant complains in depth on appeal that "the offensive conduct of [his] trial counsel, plus his lack of preparation and refusal to act in a professional manner to defend his client" denied defendant effective assistance of counsel under the state Constitution and of due process of law under the federal Constitution. In defendant's view, the trial court "had a duty

sua sponte to take action, up to and including removal of counsel from the case and declaring a mistrial, in order to protect [defendant]'s right to a fair trial under the Sixth Amendment, under the Due Process Clause of the Fourteenth Amendment [of the federal Constitution], and under Article 1, § 15 of the California Constitution."

A. Applicable Standard

"To prevail on a claim of ineffective assistance of counsel, defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.]'" (*People v. Hart*, *supra*, 20 Cal.4th at pp. 623-624, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 333, and citing, *inter alia*, *Strickland v. Washington* (1984) 466 U.S.

668, 689 [80 L.Ed.2d 674]; see also *Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [146 L.Ed.2d 389, 416].) We review defendant's claims in this context.

**B. Alleged "Refusal to Act Professionally
to Protect His Absent Client"**

As we noted in the factual summary, defendant voluntarily absented himself from the trial after Singh testified and identified defendant as the shooter. On appeal, defendant argues that his trial counsel thereafter failed to properly represent him: He charges that trial counsel "made the surprising statement that he would not be inclined to ask questions of witnesses without his client being present" and "literally threw a snit and refused to act in [a] proper, professional manner as a diligent attorney."

1. Failure to Cross-Examine. Defendant suggests that he was prejudiced by trial counsel's refusal to cross-examine prosecution witnesses, in that "[c]ounsel asked no questions on cross-examination of Henry Garcia. The same was true for Dr. Overton."

It is true that in evident frustration at his client's failure to appear, defense counsel indicated (outside the jury's presence) that he might be required to forgo cross-examination in his client's absence: "I can say I will participate, I will be here, obviously, but I don't have to ask questions and I do think I would be inclined not to. . . . [¶] . . . [¶] . . . I don't see how I can proceed in any -- you know, in any fashion

that will be of any help to the defendant. I will be here. I got to be here, obviously, but I don't have to ask questions. And I'm inclined to think at this point I would not. I would just sort of just sit here. And whatever that does to his case, or conviction, would be their problem."

But, in fact, defense counsel did not thereafter abstain from cross-examining witnesses: He engaged in extensive cross-examination of chief prosecution witnesses Pedro Garcia and Rene Rodriguez, in which he seriously challenged the credibility of both witnesses and thoroughly explored the many points on which Pedro's trial testimony contradicted his testimony at the preliminary hearing. Counsel also cross-examined the investigating officers and Rene's brother, Edward.

The only prosecution witnesses who were *not* cross-examined by defense counsel were (1) Henry Garcia and (2) Dr. John Overton. But Henry Garcia testified beneficially to defendant: He *denied* that he had reported to Detective Catherwood that defendant admitted the crime (contrary to the detective's testimony). And the doctor's testimony was brief and not particularly prejudicial to defendant. He described the wound and the location of the bullet found in Singh's body, and opined that although Singh's wound could have been fatal, it would not necessarily have been so. Indeed, the defense had attempted to eliminate Dr. Overton's testimony in its entirety by stipulation.

There were good tactical reasons to allow the testimony of both witnesses to pass unchallenged: Henry's testimony under direct examination was beneficial to defendant, and there was little to be gained from challenging the doctor or from permitting the jury to focus on Singh's injury any longer than necessary.

Defendant suggests that "Pedro Garcia told Catherwood that Henry said he and his friend . . . had seen the shooting" and "[t]hat also needed to be explored with Henry Garcia because if it is nonsense, and it appears to the jury that Henry Garcia has simply been making up stories, then the former statement [that defendant admitted to him he was the shooter] loses its steam" But the benefit and prospect of impeaching Henry Garcia's statements in light of his favorable testimony at trial denying defendant's admission is surely a judgment call that cannot be deemed ineffective assistance of counsel.

We cannot say that defendant's representation fell below an objective standard of reasonableness, or that defendant was prejudiced, by his counsel's decision not to cross-examine these two witnesses.

2. Decision to Forgo Closing Argument. Defendant also contends that he was prejudiced by his counsel's decision to forgo closing argument to the jury.

After the prosecution completed his brief closing argument, defense counsel announced: "Judge, I am going to rely upon the state of the evidence and the state of that argument. I'm not

going to make an argument.” The court then proceeded to instruct the jury with respect to their deliberations.

On appeal, defendant argues that his “[c]ounsel could not waive the client’s constitutional right to closing argument” in his absence and that counsel’s failure to present closing argument “was inexcusable, effectively defaulting to the prosecutor’s arguments” and constituted ineffective assistance of counsel.

The right to present closing argument to the jury in a criminal case is an element of the right to counsel. (*People v. Diggs* (1986) 177 Cal.App.3d 958, 969-970, quoting *Herring v. New York* (1975) 422 U.S. 853, 859, 862 [45 L.Ed.2d 593, 599, 600].)

But “[c]losing argument may be waived in an appropriate case as a matter of tactics.” (*People v. Diggs, supra*, 177 Cal.App.3d at p. 970; cf. *Bell v. Cone* (2002) 535 U.S. ____ [152 L.Ed.2d 914, 931] [the decision to waive closing argument during sentencing is “a tactical decision”].) If trial counsel’s omissions stemmed from “‘an informed tactical choice within the range of reasonable competence,’” the omission provides no basis for reversing a defendant’s conviction. (*People v. Bolin, supra*, 18 Cal.4th at p. 317.) Moreover, we must be “highly deferential” to the tactical decisions made by counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 689 [80 L.Ed.2d at p. 694].) “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable” (*Id.* at p. 690

[80 L.Ed.2d at p. 695]; *In re Cudjo* (1999) 20 Cal.4th 673, 692 [same].) And our obligation to view counsel's tactical decisions with deference extends to the review of decisions to waive closing argument. (*Bell v. Cone, supra*, 535 U.S. ____ [152 L.Ed.2d at pp. 931-932].)

The record suggests that counsel had tactical grounds for not making a closing argument.⁸

First, immediately after the case went to the jury, the prosecution reported to the trial court that defense counsel had revealed that his reason for waiving argument "ha[d] to do with him intentionally building in error." Defense counsel did not deny it, possibly considering that any benefit from closing argument was outweighed by the benefit of creating a claim for ineffective assistance of counsel.⁹

⁸ Moreover, we note that defense counsel was not entirely silent. Rather, he stated his intention to "rely upon the state of the evidence and the state of [the prosecution's closing] argument." That statement effectively communicated a belief that the prosecution had not proven its case against defendant.

⁹ This, of course, leads to the paradoxical question whether intentionally doing something to create ineffective assistance of counsel could ever be considered ineffective assistance (assuming that the intention to create it becomes known). But the intention to manufacture the basis for a claim of ineffective assistance might not become known. Second, if counsel was unreasonable in concluding that the effort to make out a claim for ineffective assistance of counsel would be successful, it could be ineffective assistance of counsel to attempt to plant the error in the proceeding.

Second, the prosecution did not argue in its closing argument that the defendant could be found guilty on a theory that the shooting was a natural and probable consequence of the burglary -- a theory of liability that could have made the identity of the shooter largely irrelevant. When the defense declined closing argument, the prosecution was foreclosed from offering any rebuttal in which to argue a theory of vicarious liability. The trial court acknowledged this strategy was a sound one: "I think [defense] Counsel was a smart counsel not making a closing argument. [¶] Number one, his client's not here. [¶] Number two, more importantly, . . . maybe [the prosecutor] intended to do it on rebuttal, but the major thrust of the case was, as far as the Court's concerned, was if the people went in . . . to perpetrate a -- a felony, which . . . I would think . . . was a burglary, it wouldn't make any difference who did the shooting. [¶] And for that reason, the prosecutor didn't mention that on his opening argument, and so I think Counsel wisely did not make a closing argument. That way, the prosecutor didn't have a rebuttal and the jury would just simply have to guess."

The goal of depriving the prosecution of rebuttal argument is a legitimate tactical basis for the decision to forgo closing argument. (*Bell v. Cone, supra*, 535 U.S. ____ [152 L.Ed.2d at pp. 931-932].) Because defense counsel's decision to forgo closing argument apparently resulted from "'an informed tactical choice'" that a reasonably competent attorney might make (*People*

v. Bolin, supra, 18 Cal.4th at p. 317), his decision cannot serve as a ground for reversing defendant's conviction on appeal. (*Ibid.*)

C. *Alleged Failure to Prepare*

"Defense counsel have the obligation to investigate all defenses, explore the factual bases for defenses [citation] and the applicable law. [Citation.]" (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028.)

Defendant contends that his counsel was "unprepared for this trial" because "[h]e had not examined various items of discovery such as sketches of the crime scene hand-drawn by Pedro Garcia and Henry Garcia, stills produced from the store surveillance video, the 911 tape, photographs, or the store surveillance videotape." As a result, defendant argues, defense counsel was surprised by Singh's identification of the defendant as the shooter at trial.

The record does not demonstrate that defense counsel failed in any material way to prepare for trial. And the record must demonstrate prejudice for a claim of ineffective assistance of counsel to succeed. (*People v. Hart, supra*, 20 Cal.4th at pp. 623-624.) Defense counsel announced that he *had* seen the store surveillance videotape before trial. Any confusion on this point, which may have arisen when the original videotape was copied onto a format that would permit viewing on a regular VCR, was resolved at trial when it was confirmed that the two were identical. Accordingly, if defense counsel was surprised

that the victim identified the defendant at trial, it was not because counsel had failed to review the surveillance tape. More likely, it was because the victim had failed before trial to identify the shooter from a photo lineup prepared by the police, which included defendant's photograph.

Similarly, the photographs that defendant now complains his counsel had not examined were still photographs created by freezing frames from the surveillance videotape. Accordingly, defendant was not prejudiced: The photographs contained no information of which defense counsel was unaware, and in any event, defense counsel had an opportunity to review the still photographs before the jury proceedings began.

Nor does the record support any suggestion that defendant could have been prejudiced by his counsel's failure prior to trial to review the victim's taped 911 call. To the contrary, defense counsel was sufficiently aware of the tape's contents to argue successfully in limine that the tape was irrelevant and should be excluded.

It is unclear from the record whether the hand-drawn diagrams of the scene prepared by Pedro and Henry during their interviews with police were provided by the prosecution in pre-trial discovery. Certainly, defense counsel cannot be faulted for failing to review that which he had not received. In any event, counsel learned about them before the prosecution's opening argument and promptly requested a chance to review them. Hence, defendant was not prejudiced.

Finally, defendant complains that his counsel "had not looked at police reports provided by the prosecutor." This apparently refers to a single report made by Pedro Garcia after his car was vandalized and did not concern the crime with which defendant was charged. The prosecutor asked Pedro about the report while attempting to establish that Pedro's car was vandalized after defendant's wife had warned Pedro not to testify against defendant and after Pedro had seen defendant nearby. When defense counsel asked about the report, the prosecutor responded that he had already provided defense counsel with a copy. Defendant fails to show that, had his counsel obtained the report earlier, it is reasonably probable that the result of the trial would have been different. (E.g., *People v. Hart*, *supra*, 20 Cal.4th at pp. 623-624.) Absent such a showing, there is no ground for reversal. (*Ibid.*)

D. Alleged "Improper Comments, Questions and Exchanges"

Defendant also contends that "the conduct of trial counsel . . . was so offensive and detracted so much from the expected dignified and serious conduct of a trial that it denied [defendant] a fair trial."

Defendant points to instances in which the court sustained objections to defense counsel's examination of witnesses and admonished defense counsel not to make argumentative objections or to ask argumentative questions of the witnesses. Defendant also notes that while the prosecutor was making his closing argument, defense counsel interrupted him with questions.

Defendant further observes that defense counsel made some highly inappropriate comments. Outside the jury's presence, he called Pedro a snitch and later said the same of the prosecutor. Another time, he interrupted the prosecutor's direct examination of Pedro by saying "son of a bitch" and said "sack of shit" during a conference outside the jury's presence. During his cross-examination of Rene, defense counsel sought to explore a matter previously excluded by the court.

In reviewing the defendant's claim that his counsel's conduct justifies overturning the jury's verdict, we are reminded of the caution urged by the California Supreme Court nearly one hundred years ago: "It rarely occurs in any case which is of moment and sharply contested that counsel on both sides in their zeal and partisan devotion to their clients do not indulge in arguments, remarks, insinuations, or suggestions which find neither support in, nor are referable or applicable to the testimony, or warranted by any fair theory upon which the case is being presented. . . . [But] [i]t is only when the conduct of counsel consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his part to awake the resentment of the jury, to excite their prejudices or passions against the opposite party, or to enlist their sympathies in favor of his client or against the cause of his adversary, . . . that prejudicial error is committed." (*Tingley v. Times Mirror*

(1907) 151 Cal. 1, 23; *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 210.)

Certainly, defense counsel was, on occasion, aggressive and argumentative; he approached, and sometimes overstepped, the line between proper and improper conduct.

But while defendant argues that his counsel "was obnoxious and offensive, making an awful impression with the jury on behalf of his client," he has not shown that trial counsel's offensive conduct affected the outcome of the trial. First, the conduct that occurred outside the jury's presence could not have affected its verdict. Second, calling a prosecution witness a snitch, trying to refer to a prejudicial excluded matter in front of the jury, and disrupting the prosecution's closing argument, although improper, were probably more prejudicial to the prosecution's case than to the defense. Third, judicial admonitions, where justified, cannot be deemed to establish prejudice without unduly restricting the trial court's ability to control its courtroom. Only the *conduct that provoked the admonitions* can establish prejudice, and as we have noted, defendant has not shown that trial counsel's offensive conduct affected the outcome of the trial. Indeed, when asked at oral argument what conduct of his trial counsel prejudiced defendant in connection with the jury's finding that the attempted murder was willful, deliberate, and premeditated -- which defendant identified at oral argument as the primary prejudice from defense counsel's actions -- he could only point to the failure

to make closing argument. And as we have noted, we cannot consider that to have been ineffective assistance of counsel based on the record before us.

In short, defendant has not shown a reasonable probability that, but for his trial counsel's aggressive or argumentative advocacy, the result of this trial would have been different, particularly given defendant's failure to appear on and after the second day of trial. Without such prejudice, there is no lawful basis for reversing the judgment.

DISPOSITION

The judgment is affirmed.

KOLKEY, J.

We concur:

CALLAHAN, Acting P.J.

ROBIE, J.